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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 46.

VIRGIL HERDMAN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

In an action to recover damages for personal injuries allegedly sustained by petitioner, a freight conductor riding in the caboose of respondent's train, when the train made an emergency stop and where there is a total failure to establish that the stop was caused by respondent's neg-

ligence, did the District Court act properly in refusing to apply the doctrine of res ipsa loquitur when petitioner's own positive, uncontradicted proof is that (1) the train was stopped to avoid striking an automobile at a grade crossing and (2) that in the ordinary course of operating a railroad, emergency stops are necessary and that in his experience as a railroader petitioner had experienced emergency stops many times, and that they must be expected and there is nothing that can be done about it, and did the District Court act properly in directing a verdict for respondent and in finding that petitioner failed in his burden of proving negligence?

STATEMENT OF THE CASE.

On February 1, 1951, the petitioner, plaintiff in the original action, was performing his regular duties as a conductor on respondent's freight train and, as conductor, was in charge of such train. The train was proceeding at a slow rate of speed (R., 12) on the main line of the railroad through a congested area in the city of Dayton, Ohio. It was a cold, winter day with snow blowing in the air (R., 29, 30). As the train approached a grade crossing of a public street at about 3:00 p. m., the train went into an emergency braking situation. Petitioner alleges that, because of the stop, he was thrown against a table and onto the floor of the caboose in which he was riding. Because the air immediately came back in the train line, petitioner knew that there was no defect in the train (R., 34). The engineer told petitioner that he had made the emergency stop to avoid striking a load of school children in an automobile that had come onto the tracks at the crossing (R., 33).

The day following these events petitioner made and filed a report (Defendant's Ex. A; R., 31, 32) as he was required to do in his capacity as conductor, which report he gave to respondent's trainmaster and in which he described the incident herein involved and the reason for the emergency stop. That report, known as a CT 75 A, was made and signed by petitioner and reads in part as follows:

> "CN 28 Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile, engineman applied air in emergency causing rough stop."

Petitioner testified that he has known of emergency applications of brakes "many times" (R., 36) and that "We got to expect them or think about them" (R., 37). In response to a question made at the taking of petitioner's deposition with respect to whether petitioner had ever ridden in a caboose before when there was an emergency application of steam, petitioner replied, "Many times" (R., 36) and further, that you have to expect an emergency stop at all times and there is nothing that can be done about it (R., 37).

Petitioner's action was commenced in the District Court of the United States for the Southern District of Ohio, Eastern Division, which court sustained the motion of respondent for directed verdict at the close of petitioner's case. The decision of the District Court was reviewed by and argued in the United States Court of Appeals for the Sixth Circuit, which court unanimously affirmed the action of the District Court. The order of the Court of Appeals

was entered on the thirteenth day of December, 1955, and stated in part:

> "We think the district judge performed his duty in directing a verdict for the appellee. There was 'a complete absence of probative facts to support the conclusion' of negligence, Lavender v. Kurn, 327 U. S. 645 (1946). And negligence remains the sole basis for liability under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1946).
>
> The judgment is affirmed."

Your respondent observes that in petitioner's statement of the case (page 6 of his brief) petitioner indicates that never in his experience had previous sudden stops of the train been as disastrous as this time. We submit that proof of record lends no support to this allegation. And, at page 6 of his brief, it is indicated that petitioner "at a later date, while suffering pain from his injuries, signed a report prepared and written by some other employee of the respondent". We are constrained to point out that petitioner stated on cross examination as follows (R., 30):

> "Q. And did you make such a report in this case? A. I did.
>
> Q. And did you sign that report? A. Yes, sir.
>
> Q. And to whom was the report given? A. To the train master.
>
> Q. And when was the report made? A. The following day.
>
> Q. And of course, your recollection of what you were doing would have been much better the following day than it is today, wouldn't it? A. Well, it was fresh in my memory at the time."

So it is that the report in question was made and signed by petitioner the day following the events complained of while his memory was fresh (R., 30) and that it was his

duty as conductor to make such reports (R., 38). The record lends no support to the allegation that petitioner was suffering pain at the time this report was made.

SUMMARY OF ARGUMENT.

In a case arising under the Federal Employers' Liability Act, the burden of proof is on the plaintiff to establish negligence of the employer which proximately caused his injury. Petitioner herein has wholly failed to establish negligence in this cause and to save his case, seeks to rely on the doctrine of res ipsa loquitur.

This doctrine, however, cannot be availed of by petitioner where evidence adduced in petitioner's own case establishes the following:

A. That the circumstances of the accident fail to present a situation such that does not occur where proper care has been exercised. Petitioner's own testimony has established that emergency applications of brakes do occur in the ordinary course of operating a railroad.

B. That the actual cause of the events complained of is not unexplained but rather is in evidence as a product of petitioner's own case in chief. Petitioner made and signed a report to his employer in which he states that the emergency stopping of respondent's train was made to avoid striking an automobile at a crossing and the contents of this report are in evidence in the record of this case.

C. The knowledge of how the occurrence happened is not peculiarly within the knowledge of this respondent, but rather is known to petitioner. Also, the testimony of other members of respondent's train crew is no less readily available to petitioner than it is to respondent.

D. The instrumentality causing the injury was an external factor not within the exclusive control of respondent, to wit, an automobile at a grade crossing.

The action of the trial court in directing a verdict for respondent, which action was unanimously affirmed by the Court of Appeals, was based upon the application of sound legal principles as announced by this court. Petitioner's evidence established no more than that (1) he allegedly sustained injuries while riding in a caboose when the train was brought to a sudden stop, and (2) the sudden stop was made to avoid striking an automobile at a grade crossing. Petitioner failed to meet the burden of proof which the law has imposed, and to permit the issues raised by petitioner's evidence to go to the jury would be to permit a verdict based upon speculation and conjecture. Accordingly, the decision of the Court of Appeals should be affirmed.

ARGUMENT.

I.

Negligence is the Sole Basis of Liability.

The Federal Employers' Liability Act establishes negligence of the employer as the sole basis for any recovery by employees in cases where the Act might apply. Title 45, Section 51, U. S. C. It is incumbent upon the plaintiff to prove negligence which caused the accident in order to recover under the Federal Employers' Liability Act. *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S., 573.

In *Fantini v. Reading Co.*, 147 F. 2d, 543, a directed verdict case, the Third Circuit Court of Appeals stated in part:

> "The right of action conferred by the Federal Employers' Liability Act rests upon requisite proof of the employer's negligence as to the proximate cause of the injury or death."

Petitioner has totally failed to meet this burden of proof. The inability to establish negligence where, in fact, respondent was not negligent was anticipated by petitioner. In his original complaint, petitioner pleaded specific allegations of negligence. However, the day before commencement of the trial in the District Court, petitioner amended his complaint in an effort to establish a basis for the assertion of the doctrine of res ipsa loquitur, under which doctrine he now attempts to save his unproved case. The law should not and does not permit the doctrine of res ipsa loquitur to be employed for such a purpose.

II.

The Doctrine of Res Ipsa Loquitur Has No Application.

We would strongly urge upon this court that the mere fact of injury raises no inference of negligence and if a plaintiff is to be permitted to substitute this doctrine in making out his case, in place of direct evidence of negligence, the particular circumstances of each such case should be carefully examined to see if applicability of the doctrine is warranted. Respondent resolutely submits that the circumstances of the instant case do not warrant its application. Factors to be considered in applying the doctrine are set forth following.

A. The Accident Must be Such That It Does Not Occur if Proper Care is Exercised.

We adopt the language in the case of *San Juan Light & Transit Co. v. Requena*, 224 U. S., 89, 99, as quoted by petitioner:

> "* * * when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, *and the injury is such as, in the ordinary course of things, does not occur if the one, having such control uses proper care,* it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Emphasis added)

Does the sudden stopping of a train fit the above pattern? The answer is furnished by petitioner's own evidence. Petitioner himself testified that the sudden stopping of a train actually does occur in the ordinary operation of a railroad (R., 36), that petitioner has known of emergency applications of brakes "many times" (R., 36),

that it must be expected at all times (R., 37), and that an emergency application of brakes must be expected when an engineer is confronted with an emergency such as he was in this case (R., 37).

The train on which petitioner was riding was brought to an emergency stop to prevent striking an automobile at a grade crossing. Under these facts the trial court correctly decided that this was not the sort of accident or situation in which the doctrine of res ipsa loquitur applies. We refer to a portion of the opinion of the trial court, wherein the court stated as follows:

> "Whether or not a case is one to which the doctrine of *res ipsa loquitur* applies is a question of law for the judge to decide. So, I have decided in this case that this is not the sort of accident or situation in which the doctrine of *res ipsa loquitur* applies. In order for it to be such a case, it would have to be a situation, a set of facts where the accident happened is something that would not happen in the ordinary course of events. In this case, it would have to be that an emergency stop would not happen in the ordinary course of operating a railroad.
>
> The plaintiff has testified in this case, that he has been in a caboose some five, six or seven times, at least when an emergency stop was made and that you always have to expect an emergency stop to be made, and that there isn't anything that you can do about it." (R., 41, 42).

It is pure self-contradiction for petitioner, after his own testimony together with the common experience of men, now to contend that emergency stops do not happen in the ordinary course of operating a railroad. The law cannot and should not justify the proposition that if an emergency stop is made by an engineer operating a railroad train, that engineer and his master are presumed to be negligent in law.

A number of state court decisions affirm the rule that the sudden stopping of a train is not of such unusual character as to permit application of the doctrine. *St. Louis & S. F. R. Co. v. Dorman,* 205 Ala., 609, 89 So., 70; *Hunt v. Chicago, B. & Q. R. Co.,* 181 Iowa, 845, 165 N. W., 105; *Missouri K. & T. R. Co. v. Taylor,* 69 Okla., 79, 170 P., 1148; *McGraw v. Southern R. Co.,* 206 N. C., 873, 175 S. E., 286. We submit that this is particularly true where the party complaining testifies that it is not an unusual occurrence.

The Fifth Circuit Court of Appeals has stated:

> "In the final analysis, each case seeking to invoke the doctrine must stand or fall upon its own facts. *Res ipsa loquitur* is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience." *Williams v. United States,* 218 F. 2d, 473, 476.

Is it not more plausible to assume that good and sufficient reason existed for making an emergency stop than to assume it was made for absolutely no reason at all, contrary to all good railroad practice? Human experience in cases such as the one at bar compels the conclusion that negligence is not to be inferred in the instant case.

B. If the Actual Cause of the Events Complained of is in Evidence the Doctrine Does Not Apply.

The emergency stopping of respondent's train was made to avoid striking a load of school children in an automobile at a public crossing. Petitioner admits having made (R., 30) and signed (R., 30), a report known as a CT 75 A (Defendant's Ex. A; R., 30 to 32) which report he was required to file as conductor and employee in charge of respondent's train. This report, quoted in the statement of the case, supra, indicates the emergency stop was made to prevent

striking an automobile at a crossing, and petitioner admits that the engineer of the train told him that there was a load of school children in an automobile and he stopped to avoid striking that automobile (R., 33). Petitioner, in his brief at page 6, infers that this report is hearsay, being based on a conversation and having been prepared by some other employee.

We emphasize that petitioner's report of this accident was read into the record without objection (R., 31, 32), and is to be given its natural probative effect. This court has before applied the rule that if hearsay evidence is admitted without objection, it is to be considered and accorded its natural probative effect. *Spiller v. Atchison T. & S. F.*, 253 U. S., 117; *Diaz v. United States*, 223 U. S., 442. Even more so, then, is this report competent evidence since petitioner admits having signed it (R., 30) and that he made such a report in this case (R., 30) in discharge of his responsibilities as conductor of the train.

We submit that the reason for the sudden stopping on the part of respondent's engineer, far from being a failure to "exercise proper care by the one having control," rather, epitomized due care in the premises. See *Canton Motor Coach, Inc. v. Hall*, 46 Ohio App., 516. The reason for the sudden stopping being in evidence as a part of petitioner's own case, negligence of respondent is not only dismissed as a reasonable conclusion, but any plausible argument for the application of res ipsa loquitur is completely destroyed. The Ninth Circuit Court of Appeals has stated the rule as follows:

> "The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the

defendant's negligence, but excludes all others." *Lucid v. Du Pont,* 199 F., 377.

To the same effect is *Dierks Lumber & Coal Co. v. Brown,* 19 F. 2d, 732.

The Sixth Circuit Court of Appeals analyzed the doctrine in *Cochran v. Pittsburgh & L. E. R. Co.,* 31 F. 2d, 769, at page 772 as follows:

> "The res doctrine is not applicable, or, in other words, negligence will not be inferred merely by proving or alleging the relation of carrier for hire and injury to a passenger while on his journey, or proof of the relation of master and servant and injury in the course of his employment, even under the Federal Employers' Liability Act. Something more is required. The circumstances characterizing the accident must be alleged and proved. These circumstances must create a reasonable probability that the accident was due to negligence, rather than to pure accident or act of God; that the defendant or its employees, other than the one injured, should have had control of the agency as would not ordinarily have happened, if ordinary care had been exercised; that the circumstances did not leave outstanding another existing and equally probable cause of the accident, not depending on the master's negligence, and for which he would not be liable; that the circumstances of the accident were such that the means and opportunity of finding out how it happened, or what caused it, are more properly within the knowledge and control of the master than of the servant."

The Ohio law in this regard is expressed in the second syllabus of the recent case of *Krupar v. Procter & Gamble Co.,* 160 Ohio St., 489 (1954):

> "In a negligence action if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the

negligence of the defendant. (Paragraph three of the syllabus in the case of Gedra v. Dallmer Co., 153 Ohio St. 258, approved and followed.)"

In the instant case not only do the circumstances leave outstanding another existing and equally probable cause, but the actual cause is in evidence as a part of petitioner's own case.

C. The Knowledge of How the Occurrence Happened Must be Peculiarly Within the Knowledge of Defendant.

Many decisions justify application of the rule on the ground that the knowledge of how the occurrence happened is peculiarly within the knowledge of the defendant. *Terminal R. Ass'n of St. Louis v. Staengel*, 122 F. 2d, 271, 276; *Cochran v. Pittsburgh & L. E. R. Co.*, 31 F. 2d, 769, supra; *Pitcairn v. Perry*, 122 F. 2d, 881. But here the petitioner himself knows the reason for the stopping as evidenced by the report which he made and signed and delivered to respondent as it was his duty so to do. We quote from 65 *C. J. S.*, 1002, Negligence Sec. 220 (6):

"Although, as discussed supra Sec. 220 (3), the doctrine of res ipsa loquitur provides a substitute for direct proof of negligence, the rule is nevertheless one of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available. Hence, the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear."

We believe it to be of particular significance that petitioner failed to present the testimony of any other member of respondent's train crew, the only testimony offered by petitioner in support of his case being that of himself and his doctor. Such testimony would have been no less readily available to petitioner than it would have been to this respondent. An Illinois appellate court made a similar observation in the case of *Chestnut v. L. & N. R. Co.*, 81 N. E. 2d, 660, stating in part as follows:

> "* * * In the case at bar there is no reason shown why plaintiff could not have produced the evidence of the other members of the crew to have given the court and jury the benefit of testimony of acts and omissions by them and it cannot be said that this evidence was any more readily available to the defendant than it was to the plaintiff. * * *"

Mr. Justice Frankfurter commented on the doctrine in a separate opinion in *Johnson v. United States*, 333 U. S., 46, stating at page 53, "It is, after all, a rule of necessity to be invoked only when necessary evidence is absent and not readily available." In the instant case, the necessary evidence is in the record as a product of petitioner's own case in chief.

D. The Instrumentality Causing the Injury Must Have Been in the Exclusive Control of Defendant.

The heading of this sub-section illustrates another element requisite to application of res ipsa loquitur. *Southern R. Co. v. Bennett*, 233 U. S., 80. The instrumentality here involved is an external factor, an automobile at a crossing.

It is important to distinguish between the area in which this accident occurred and an emergency stopping situation which occurs in the confines of railroad switch yards wherein the railroad maintains control over the entire area.

Notwithstanding petitioner's misleading allegation that the train was moving within respondent's yard limits, the evidence establishes the scene of the accident as being a well built up area in the city of Dayton, Ohio (R., 18), on a cold winter day with the snow blowing (R., 29, 30) and at a "crossing just east of Dayton Rubber Works" (R., 32), on the main line of respondent's railroad, and on a regular run from Richmond, Indiana to Columbus, Ohio. The instrumentality proximately causing the alleged injuries was an automobile on a public highway— a situation completely out of and apart from respondent's control.

In the recent case of *Smith v. Baltimore & O. R. Co.*, 204 F. 2d, 162, the Sixth Circuit Court of Appeals, which affirmed the decision of the District Court in the instant case, held that the doctrine of res ipsa loquitur had no application to a case in which defendant's train collided with a tractor-trailer which collided with the locomotive was not under the control of defendant. This court denied certiorari in 346 U. S., 838. Similarly, respondent in the instant case had no control over the automobile on the crossing which created an emergency and resulted in the sudden stopping here.

Respondent respectfully urges upon this court, that while any one of the four arguments outlined in this Section II of its brief dismisses this case as being one for the application of the doctrine, certainly the collective arguments which this case provides compels the conclusion that it is not a res ipsa loquitur situation.

III.

The Direction of Verdict For Respondent Was Proper.

No less important than the question of whether res ipsa loquitur applies in this action is the separate issue of whether the trial judge abused his judicial discretion in directing a verdict for respondent. It is a well settled rule that even where the doctrine of res ipsa loquitur does apply, which respondent resolutely denies in this case, this does not preclude the direction of a verdict for the defendant. *Southern R. Co. v. Bennett*, 233 U. S., 80; *Dierks Lumber & Coal Co. v. Brown*, 19 F. 2d, 732; *Terminal R. Assn. of St. Louis v. Staengel*, 122 F. 2d, 271. For, as this court has stated, the doctrine *does not* avoid the requirement that upon the whole case, petitioner must prove a breach of the duty of due care by a preponderance of the evidence. *Commercial Molasses Corp. v. New York T. B. Corporation*, 314 U. S., 104. The trial judge heard the facts and drew the following conclusion in his statement to the jury:

> "Now, for the plaintiff to recover against the defendant in this case, he must show negligence against the defendant; that is, he must show that he was injured through the negligence of the defendant acting through some of its employees. I think, as may have been said to you on your voir dire examination, that this is not a situation like we have in Ohio, under the Workmen's Compensation Law, where all a person has to do is show that he was injured while in the performance of his duties. This case comes under a federal law, that is, a law passed by the Congress of the United States, and its only provision is that an employee who is injured may recover against the defendant for the negligence of the defendant. And so, the court comes to the conclusion that this is not the sort of case where negligence may be inferred and there is no proof of negligence." (R., 42)

We believe the trial court's analysis to be sound in legal theory. The petitioner offered testimony of only himself and his doctor. We have already commented on his failure to produce evidence from other members of respondent's train crew. In addition is the fact that any inference of negligence petitioner thinks he raised on direct examination (a matter which respondent unqualifiedly denies) was totally destroyed by petitioner's own testimony on cross examination.

The point we are here emphasizing is that the trial court, in directing a verdict, acted under the well known rule of "reasonable minds." This case was certainly amenable to such a test where evidence of negligence on the part of this respondent was totally lacking. This court has clearly stated that a verdict may be directed in favor of one of the parties when the testimony and all the inferences which the jury can justifiably draw therefrom are insufficient to support a different verdict. *McGuire v. Blount*, 199 U. S., 142; *B. & O. Railroad Co. v. Groeger*, 266 U. S., 521; *Chicago M. & St. P. R. Co. v. Coogan*, 271 U. S., 472; *Chesapeake & O. R. Co. v. Mihas*, 280 U. S., 102. And more than a scintilla of evidence is required. So spoke Mr. Justice Reed in the case of *Brady v. Southern R. Co.*, 320 U. S., 476, stating in the opinion of the court at page 479 as follows:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. Western & A. R. Co. v. Hughes, 278 US 496, 73 L ed 473, 49 S Ct 231, supra; Baltimore & O. R. Co. v. Groeger, 266 US 521, 524, 69 L ed 419, 45 S Ct 169. Cf. Gunning v. Cooley, 281 US 90, 94, 74 L ed 720, 724, 50 S Ct 231; Marion County v. Clark, 94 US 278, 284, 24 L ed 59, 61. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable con-

clusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Petitioner quotes in his brief (p. 10) from *Sweeney v. Erving*, 228 U. S., 233. This decision was amplified and explained in *Gray v. B. & O. R. Co.*, 24 F. 2d, 671, wherein the court after quoting from the *Sweeney* case stated:

"Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury,' the court meant that unexplained, the facts make a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, "it is evidence to be weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'

"If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury, such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, where the Court restated a well known rule: 'The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and shall be directed for the other party' * * *"

This court affirmed a directed verdict for the defendant in the Federal Employers' Liability Act case of *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S., 573. Mr. Justice Minton, speaking for the court, stated at page 577 as follows:

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and

when it did for no purpose at all, *contrary to all good railroading practice*, prior to the time decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v. United States, 319 U. S. 372, 395, 87 L. ed 1458, 1473, 63 S. Ct. 1077.

"Since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict." (Emphasis added)

To deny the right of the trial court to direct a verdict here, upon the mere fact that the train stopped where and when it did, would permit speculation to supply the place of proof. It would permit an inference of negligence from the mere fact of injury alone—contrary to the Federal Employers' Liability Act and the judicial interpretation thereof as announced by this court.

IV.

Petitioner's Analysis Fails.

Petitioner, at page seven of his brief, sets forth three interpretations of the Court of Appeals opinion herein. The first has already been given adequate comment. The second, to the effect that the court has placed an almost impossible burden of producing evidence upon the plaintiff, is wholly without merit. It is not because of any "impossible burden" of proof that petitioner's case does not admit of negligence on the part of the railroad. This quite simply is not a case of negligence and petitioner has failed to sustain the burden which the law has most justifiably imposed. Nor does this case establish any conflict of authority. We distinguish the case of *Zumwalt v. Gardner*, 160 F. 2d, 298, cited by petitioner. In that case the plaintiff, a switchman, attempted to board a switch engine when the engine,

for some unknown reason, went into an emergency stop and jarred plaintiff off backwards. The court stated at page 302:

> This occurrence and the circumstances surrounding it furnished evidence from which the jury might have inferred negligence which if not explained or not explained satisfactorily would have supported a verdict for plaintiff. We do not mean by this that this evidence compelled a verdict for plaintiff, but only that it would have warranted such a verdict."

The instant case is to be distinguished in that the reason for the emergency stop is in evidence and is known to this petitioner. In the *Zumwalt* case, some of the testimony was in conflict with admitted physical facts and one of the grounds pleaded was based on the Safety Appliance Act. Neither of these factors are present in the instant case.

Petitioner also seeks support from the case of *Chesapeake & Ohio Ry. Co. v. Smith,* 42 F. 2d, 111. There, the evidence showed that defendant's train was sent down the wrong track through the negligence of the head brakeman in throwing the wrong switch in defendant's switching yards and that after it had proceeded but eight car lengths it came to a sudden stop. The court stated at page 114:

> "But, in view of the brakeman's initial mistake, the violence of the stopping, the fact that the accident occurred in broad daylight, *and the complete absence of any evidence of such a sudden emergency, there seems to be no outstanding probable cause of the accident other than defendant's negligence.*" (Emphasis ours.)

In the case at bar there is no evidence of an "initial mistake" and in the record, rather than "complete absence", there is proof of the emergency and the reason why the engineer, in the exercise of due diligence, stopped the train.

In the case of *Kansas City Southern Railway Company v. Justis,* 232 F. 2d, 267, there likewise was no reason for the sudden stopping of the train in evidence. Judge Cameron, in a dissenting opinion there stated as follows:

> "For the reasons set forth in my dissenting opinion in Texas & Pacific Railway Co. v. Buckles, 5 Cir., 232 F. 2d 257, I think it was error for the Court below to consider or apply the doctrine res ipsa loquitur. I developed in that opinion the general rule that this doctrine was a rule of necessity only, and was applicable only when necessary evidence is absent and not readily available. Here, as there, I think that the facts were fully developed in the evidence."

This action does not involve a defect in equipment and those cases cited by petitioner arising under the Federal Safety Appliance Act have no application here. Passenger cases cited by petitioner are likewise distinguishable in that, "a carrier for hire owes to a passenger the highest degree of care known to the law, whereas the interstate carrier owes to the employee only what we call ordinary care. * * *" *Cochran v. Pittsburgh & L. E. R. Co.*, 31 F. 2d, 769, 772.

Petitioner's third interpretation of the Court of Appeals opinion is to the effect that the court has substituted itself for the jury to determine whether an inference of fact has been rebutted. To this we shall not reiterate the matters set forth at Section III of this brief. Suffice it to say that the result which has obtained in the two lower courts is quite adequately explained by, and justifiably grounded on, the record herein which establishes merely that (1) the circumstances of this case do not warrant application of the doctrine res ipsa loquitur, and (2) any inference of negligence which petitioner believes to have been raised by his testimony was so destroyed upon cross examination as to compel the finding that sufficient evidence to support a verdict was entirely lacking.

In answer to the case of *Chicago & N. W. Ry. Co. v. Green,* 164 F. 2d, 55, to the effect that a directed verdict in a res ipsa loquitur case under the Federal Employers' Liability Act is a situation of rare exception, respondent submits that in this regard, the Federal Employers' Liability Act should not be placed in a class different from any other negligence situation. This court has stated in the case of *Urie v. Thompson,* 337 U. S., 163, that the Federal Employers' Liability Act is founded on *common-law concepts of negligence and injury,* subject to such qualifications as Congress has imported in those terms. While we strongly deny the instant situation as being amenable to res ipsa loquitur, there is no legal justification for the proposition that the Federal Employers' Liability Act requires a different standard by which to measure the test for directing a verdict. Neither Congress nor this court has expressed itself as accepting such an extreme theory.

CONCLUSION.

The record in this case establishes that the facts here do not justify and, in truth, deny the application of res ipsa loquitur and by reason of petitioner's failure to meet the burden which the law has placed upon him, the Court of Appeals was correct in its unanimous affirmance of the action of the trial court in directing a verdict for your respondent. We respectfully submit that this court, on the basis of the precedents established by prior decisions as well as on the basis of justice in legal theory appropriate to the facts herein presented, should affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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